IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 77

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

THE GREYHOUND CORPORATION,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MISCELLANEOUS

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STATUTES INVOLVED

In addition to the statutory provisions set forth in Appendix B, pages 26-29, of the petition, respondent sets forth additional relevant statutory provisions in Appendix A of this brief (infra, p. ~~23~~ 19-21).

STATEMENT OF THE CASE

The respondent deems it necessary to make the following statement in order to correct inaccuracies and omissions in the statement of the petitioner.

a. The Representation Proceeding

The Greyhound Corporation (plaintiff in the District Court, appellee in the Court of Appeals, and respondent herein, and referred to herein as Greyhound or respondent) is a Delaware corporation engaged in interstate motor carriage (R 1)[1] and operating terminal facilities at numerous locations, including Jacksonville, Miami, Tampa, and St. Petersburg, Florida (R 29). Floors, Inc., of Florida (hereinafter referred to as Floors) is a Florida corporation and a wholly-owned subsidiary of Floors, Inc., of Georgia. Floors is engaged in the business of furnishing cleanup, building maintenance, and other allied services to varied customers throughout Florida, including the four Greyhound terminals referred to above (R 45). Of the more than 500 persons employed by Floors in Florida, only 63 work part or full time at Greyhound terminals in Florida (R. 45).

Floors furnishes its services on a fixed price or cost-plus basis to all customers (R 46). Greyhound and Floors have no common identity, are not a single or joint entity, have no common directors, stockholders, or officials, and there is no mutuality of operating control (R 5, 51).

On April 17, 1961, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as the Union), filed a petition with the National Labor Relations Board (hereinafter referred to as the Board), seeking to be certified as

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[1] R refers to the Record on Appeal as printed for use in the Fifth Circuit and filed by petitioner. P refers to the Petition for Writ of Certiorari.

the representative for collective bargaining for "all porters and maids located in the Greyhound Corp. bus terminals at Miami, St. Petersburg, Tampa and Jacksonville, Florida." Said petition gave the name of the employer as "Floors, Inc." On May 25, 1961, the Union filed an amended petition, seeking to represent the same unit described in the original petition, and gave the name of the employers as "Southeastern Greyhound Lines, and Floors, Inc.". These two petitions were attached to the Regional Director's motion to dismiss and alternative motion for summary judgment, but were not included in the Record on Appeal. However, said petitions are referred to in the decree of the District Judge (R 67).

By Decision and Direction of Election dated May 3, 1962 (R 10-13), the Board directed its Regional Director (defendant in the District Court, appellant in the Court of Appeals, and petitioner herein) to conduct an election no later than 30 days from May 3, 1962 (R 12) among:

> "All porters, janitors and maids working at the Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other employees of the Greyhound Corporation and Floors, Inc. of Florida." (R 11)

The Board's decision found both Greyhound and Floors to be the "joint employer" of the persons in the above described unit (R 11, 12). In support of this conclusion, the Board found:

> "It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters,

janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R 11, 12).

There is no finding that Greyhound has any right, control, or authority to bargain collectively with the persons in the unit "in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Section 9 (a) of the Act, P 26)

Member Rodgers dissented, stating:

"On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition." (R 12)

Following the Board's Decision and Direction of Election, petitioner proceeded to arrange for the election on either May 28 or May 29, 1962, but no later than June 1, 1962 (R 13-17).

b. The Instant Action

On May 24, 1962, Greyhound filed its complaint and supporting exhibits (R 1-44), seeking an injunction against the effectuation of the Board's Decision and Direction of Election by the Board's Regional Director, on the grounds, inter alia, that the said Decision and Direction of Election was in excess of the Board's delegated powers, contrary to the provisions of the National Labor Relations Act, as amended, and violative of respondent's rights under the Act. The said action was not one to review an alleged erroneous decision of the Board, but was an initial action pursuant to 28 USC 1337 (infra, p. 19). The complaint attacked the validity of the Board's Decision and Direction of Election *on its face*. The transcript of the representation hearing was not filed in the cause by either party, the complaint not being one for review or to correct an alleged error.[2] Essentially, the complaint was predicated upon the fact that the Board's Decision and Direction of Election showed on its face that the Board's own findings of fact conclusively evidenced action of the Board in excess of its delegated powers and contrary to the provisions of the Act.

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[2]It is noted that the Union's motion to file an amicus curiae brief and the brief appended to said motion cites from and argues at length with reference to the transcript of the representation proceedings. Should the Union's motion be granted, all references to that transcript are impertinent and immaterial, because said transcript was not a part of the record in either the District Court or in the Court of Appeals.

The Regional Director filed a motion to dismiss and, in the alternative, a motion for summary judgment without supporting affidavits, although respondent's complaint for injunction was supported by affidavits.

After having issued a temporary restraining order (R 52), and a 10-day extension of that order (R 58-60), and after hearing, the District Judge issued his final decree for permanent injunction and memorandum opinion (R 60-69). The District Judge held that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in the described unit (R 61). The Court's order denying the petitioner's motions was predicated upon express findings and conclusions that, inter alia, Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board (R 62); it is impossible to comprehend how an employer could bargain in good faith about wages with employees who are not paid by said employer and over whom the said employer cannot exercise the power of hiring or firing (R 62); the case is controlled by the decision of this Court in *Leedom v. Kyne* (1958), 358 U. S. 184 (R 62); the Board has acted in excess of its delegated powers (R 62, 63); and the matter involved in the cause does not involve a review of an erroneous decision of the Board, but rather involves an at-

tack on the action taken by the Board, which it is not authorized to take under the statute (R 64).[3]

REASONS WHY THE WRIT SHOULD BE DENIED

The question presented has been settled by the Court in *Leedom v. Kyne* (1958), 358 U. S. 184; the decision of this Court in *Leedom v. Kyne, supra*, is not in conflict with the decision of the Court of Appeals; the decision of the Court of Appeals is not in conflict with any decision of another court of appeals on the same matter; and the decision of the Court of Appeals raises no question of great importance to the future administration of the National Labor Relations Act, as amended, which has not been settled by this Court in *Leedom v. Kyne, supra*.

ARGUMENT

1. In *Leedom v. Kyne* (1958), 358 U. S. 184, 185, this Court stated:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers."

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[3] A summary of the District Judge's opinion as stated at R 61-62 is: "The Court is therefore of the opinion and finds that with regard to representation proceedings the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees. The Court finds that Section 9 of the Act erpressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board."

In that case, the action was brought by a union president, individually and in his official capacity, seeking an injunction against the Board, on the basis that the Board had exceeded its statutory authority in refusing to direct a vote among professional employees to determine whether they wished to be included in a unit with non-professional employees. Section 9 (b) (1) provides that the Board shall not decide that any unit is appropriate for collective bargaining purposes, if such unit includes both professional employees and employees who are not professional employees, unless a majority of such professional employees vote for inclusion in such unit. The Board had included a few non-professionals in a professional unit and had declined to hold an election among the professional employees as required by Section 9 (b) (1) of the Act. The members of the Board filed a motion to dismiss and, in the alternative, for summary judgment. The plaintiffs moved for summary judgment. Defendants' motions were denied and plaintiffs' motion for summary judgment was granted.[4] This Court further stated, at 358 U. S. 188:

> "The record in this case squarely presents the question found not to have been presented by the record in A. F. of L. v. NLRB (US) supra. This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense

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[4] *Kyne v. Leedom* (D.C. D.C. 1956), 148 F. Sup. 597; affirmed *Leedom v. Kyne* (D.C. Cir. 1957), 249 F. 2d 490; affirmed by this Court, *Leedom v. Kyne*, supra.

of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9 (b) (1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, 'the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.' (Emphasis added [by Court]) Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would 'vote for inclusion in such unit.' Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

This Court did not make any finding which justifies a distinction between the right of an employer and the right of a union to obtain such relief. The minority of the Court, at 358 U. S. 195, construed the majority opinion as having the effect that "Both union and management will be able to use the tactic of litigation to delay the initiation of collective bargaining when it suits their purposes."

The instant case presents the same situation as was present in *Leedom v. Kyne*. The Board found that the employees of Floors were also the employees of Greyhound in spite of the fact that the Board's Decision and Direction of Election shows on its face, as a matter of law, that only Floors is the employer and that none of the indicia of an employment relationship exists between the employees and Greyhound. The petitioner argues that there is no prohibition in the Act which would deprive the Board of jurisdiction to make such a finding and continue its processes with regard to Greyhound. Section 2 (3) of the Act (infra, p. 20), when viewed, as it must be, in the light of the legislative history of that section, demonstrates quite clearly that the Board may not determine that a person is the employee of another, unless such other person employs the alleged employee for hire. The legislative history supporting this contention is unequivocal. Prior to the enactment of the Labor-Management Relations Act, 1947, the Board and this Court had given to the term "employee" a definition not limited to the accepted legal and dictionary definition of the term. In amending Section 2 (3), the Congress emphasized that the purpose of the amendment was to restrict the Board and the courts to the concept of the word "employee" as one who works for another for hire.[8]

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[8]The House Committee Report reads, in part, as follows: "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 US 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the

In *National Labor Relations Board v. Hearst Publications, Inc.*, (1944), 322 U. S. 111, this Court had affirmed the Board's determination that certain persons were employees and had relied upon the Board's expertise in so deciding. The alleged employees in that case did not meet either the common law or dictionary definition of "employee". As pointed out above, the expressed purpose of Congress was to prevent further such interpretations. *Hearst Publications, Inc. v. National Labor Relations Board* (9 Cir. 1943), 136 F. 2d 608, 611, is the decision reversed by this Court in the *Hearst* case, *supra*. In that case, the Ninth Circuit stated:

Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'." H. Rep. 245, 80th Cong., 1st Sess., p. 18. Vol. 1, Legislative History of the Labor-Management Relations Act, 1947, page 309. The Conference Report follows the House Committee Report. H. Rep. 510, 80th Cong., 1st Sess.; U.S.C. Cong. Serv. 80th Cong., 1st Sess., p. 1138.

> "The National Labor Relations Board has no jurisdiction over a controversy between a newspaper publisher and its newsboys unless the latter are employees of the former."

The purpose of Congress was not simply to exclude "independent contractors" from the definition of the term "employee", but was to make sure that only persons who were actually "employees" of their own employer were covered by the Act with regard to representation proceedings.

Attempts to broaden the definition of the term "employee" beyond that contemplated by the Congress have been made based upon the language of Section 2 (3) of the Act, the first portion of which reads:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise,. . ."

Mr. Justice Roberts clearly disposed of this contention in his dissenting opinion in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 136, 137, which is now the controlling law:

> "It is urged that the Act uses the term in some loose and unusual sense such as justifies the Board's decision because Congress added to the definition of employee above quoted these further words: 'and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise, . . .' The suggestion seems to be that Congress intended that the term employee should mean those who were not in fact employees, but it is perfectly evident, not only from the provisions of the Act as a whole but from the Senate Committee's Report, that this phrase was added to prevent any misconception of the provisions whereby employees were to be allowed freely to combine and to be represented in collective bargaining by the representatives of their union. Congress intended to make it clear that employee organizations did not have to be organizations of the employees of any single employer. But that qualifying phrase means no more than this and was never intended to permit the Board to designate as employees those who, in traditional understanding, have no such status."

The over-all legislative intent is likewise clearly expressed, insofar as representation matters are concerned, in Section 9 of the Act (P 26-27).

The Board derives its statutory authority in representation matters from Section 9 of the Act. That section clearly provides that a representation proceeding leading to election and/or certification is limited to a proceeding between the representative of "employees" and the "employer" of the particular "employees". Section 9 (b) of the Act provides that the Board shall decide in each case whether "the unit appropriate for the purposes of collective bargaining shall be *the employer unit*, craft unit, plant unit, or subdivision *thereof*." (Italics added) (P 26-27). Section 9 (c) (1) (A) (infra, p. 21) of the Act provides for hearings

and elections with reference to the claim of *employees* that they wish to be represented by collective bargaining with *"their employer"*. The usual effectuation of a Section 9 certification is the prosecution of an unfair labor practice case under Section 8 (a) (5) (infra p. 20), which provides "It shall be an unfair labor practice for an *employer* — (5) To refuse to bargain collectively with the representatives of *his employees* subject to the provisions of Section 9 (a)". (Italics added). The terms "employer" and "employee" are not defined in the Act except to the extent that Sections 2 (2) and 2 (3) specifically include certain employers and employees and specifically exclude certain employers and employees. In *Pittsburgh Plate Glass Company v. National Labor Relations Board*, 313 U. S. 146, at page 152, the Court defined the provisions of Section 9 (b) of the Act as follows:

> "In accordance with this delegation of authority, the Board may decide that all employees of *a single employer* form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision *thereof* are more appropriate." (Italics added).

As a matter of law, the employees of an independent contractor are not the employees of the principal engaging the contractor.[6]

The lack of jurisdiction in the Board in the instant

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[6] *Greyvan Lines, Inc. v. Harrison* (7 Cir. 1946), 156 F. 2d 412, 414, affirmed 331 U. S. 704; *National Labor Relations Board v. Denver Building and Construction Trades Council* (1951), 341 U. S. 675, 689, 690.

case is no less present than in *Kyne*. The petitioner's argument that an employer should have no recourse to the courts, whereas unions may have such recourse, is founded upon no legal or equitable basis. When the Board has exceeded its statutory authority, it has no authority, and thus is wholly without jurisdiction. Being without jurisdiction, the Board may be enjoined from proceeding as if it did have jurisdiction. Greyhound's right in the instant case is no less a right than was Kyne's right in *Kyne*. The plaintiffs in both cases had the right to an injunction against the Board's deprivation of that right. Had the Board been acting in a quasi-judicial capacity (as in an unfair labor practice proceeding), a writ of prohibition would lie to prevent the attempted exercise of jurisdiction which was lacking. Where the acts of the Board are administrative, injunction is the appropriate remedy to prevent the exercise of acts outside the Board's jurisdiction.

Respondent again emphasizes that the judicial proceedings in the instant case did not seek a "review" of an alleged erroneous decision on the part of the Board, but sought relief against the Board from acting in excess of statutory authority and contrary to the command of a statute. The petitioner must look to the legislative history of Section 10 of the Act for limitations upon access of parties to the courts, because that section does not in terms provide that Section 10 review proceedings are normally exclusive. Likewise, the respondent looks to legislative history, as hereinabove set forth, to find the limitations placed upon the Board by the Congress with regard to who is and who is not an employee.

2. The holding of the Fifth Circuit that *Kyne* permits

a party to obtain relief from a federal district court against acts of the Board in excess of its statutory authority is not in conflict with the decision of any other court of appeals subsequent to *Kyne*. The petitioner rests his case upon the theory that an employer has an adequate remedy other than by injunction, but that a union does not. The argument is predicated upon the fact that the plaintiff in *Kyne* happened to be a union. The petitioner argues that the holding of the Fifth Circuit is in direct conflict with decisions of the Court of Appeals for the District of Columbia Circuit (P 10); and that the cases cited as conflicting are likewise in conflict with certain other decisions (P 11).

Petitioner cites *General Cable Corporation v. Leedom* (D. C. Cir. 1960), 278 F. 2d 237; *Atlas Life Insurance Co. v. Leedom* (D. C. Cir. 1960), 284 F. 2d 231; and *Norris v. National Labor Relations Board* (D. C. Cir. 1949), 177 F. 2d 26. In *General Cable* and *Atlas*, the subject matter was alleged inconsistency between the Board's actions and the Board's internal rules. There was a complete absence of any act in excess of statutory powers. In both cases, the court recognized the doctrine of *Kyne*. The issue of whether or not an employer could resort to a federal district court was not determinative. *Norris* preceded *Kyne* by 9 years. The plaintiff in that case desired to contest the union's representation of a substantial number of employees. The court found that this was merely an administrative determination for which investigative procedures existed.

Petitioner, in support of his contention of conflict between the courts of appeals, cites *Boyles v. Waers* (10 Cir. 1961), 291 F. 2d 791; *Consolidated Edison Co. v. McLeod* (2 Cir. 1962), 302 F. 2d 354. Again, both *Boyles* and *Consolidated*

involved claims that the Board was violating its own internal rules. The cases in no way decide that an employer may or may not resort to the courts. The same is true of the district court case cited by petitioner, *U. S. Pillow Corp. v. McLeod* (S.D.N.Y. 1962), 208 F. Supp. 337. In no case cited by the petitioner was the distinction between the rights of an employer and the rights of a union delineated.

By footnote (P 10), the petitioner also relies upon an alleged conflict represented by a decision of the Sixth Circuit, denying a stay pending an appeal in a case alleged to be similar to the instant one. *Eastern Greyhound Lines v. Fusco* (N. D. Ohio), 51 LRRM 2278, September 12, 1962, stay pending appeal denied (6 Cir. 1962), 51 LRRM 2661. The *Fusco* case was one in which a determination was made by the Board that certain employees were not supervisors, as against the employer's contention that they were supervisors. As opposed to the employer's argument that the decision showed on its face that the employees were supervisors as a matter of law, the Court held: " . . . . the hearing examiner's decision shows that he followed the statutory language almost verbatim.".

Section 2 (11) of the Act defines the term "supervisor" as meaning "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, . . ." etc. Had the Board found that the employees in issue possessed the authority set forth in the definition and had, nevertheless, found them not to be supervisors, the Board would clearly have been acting in contravention of a statutory provision and outside its jurisdiction. Had that been so,

and only had that been so, the *Fusco* case would be analogous to the instant case.

3. The petitioner argues that unless the Fifth Circuit's decision be reversed, it would provide added impetus for employers' suits to review Board orders in representation proceedings. The respondent does not argue that the Fifth Circuit's decision expands the doctrine of *Leedom v. Kyne*. On the contrary, the Fifth Circuit's decision is clearly within that doctrine and is a very narrow decision, in that the jurisdiction of federal district courts is limited in such cases to acts which are, on the face of the Board's orders, beyond the Board's statutory authority and in excess of the Board's jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

The following are relevant statutes not included in Appendix B of the petition:

1337. COMMERCE AND ANTI-TRUST REGULATIONS—The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. (June 25, 1948, c. 646, § 1, 62 Stat. 931, 28 U.S.C. 1337)

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Sec. 2. * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Sec. 8. (a) It shall be an unfair labor practice for an employer * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 9 * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a);